No. 16-1435

# In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,
*Petitioners,*

v.

JOE MANSKY, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## TABLE OF CONTENTS

Table of Authorities ..... iii
Interest of *Amici Curiae* ..... 1
Introduction and Summary of Argument ..... 2
Argument ..... 4
I. State regulation of campaign related expression at the polling place has been key to establishing orderly and peaceful elections. ..... 4
II. Disruption at polling places remains a significant problem. ..... 8
A. Polling places sometimes experience serious disruptions. ..... 9
B. Disruptions in polling places lead to serious delays and non-voting ..... 13
C. Allowing political apparel in polling places will exacerbate these existing problems ..... 16
III. A polling place is a nonpublic forum where poll workers may exercise discretion to exclude apparel bearing political messages ..... 19
A. Forum analysis must be applied to Section 211B.11. ..... 20
B. A polling place is a nonpublic forum, where restrictions on expression need only be reasonable. ..... 21
C. It is reasonable for Section 211B.11 to make subject matter distinctions and grant discretion to poll workers. ..... 24
Conclusion ..... 26

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to address the constitutional authority of states to maintain order at polling places, a matter of considerable importance to both governments at all levels and to the individuals who are served by those governments. *Amici* include:

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and edu-

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[1] No counsel for a party authored the brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

cational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners maintain that the Minnesota law challenged in this case has a "breathtaking reach" that criminalizes "all political speech that can be communicated through shirts, hats, buttons, and other apparel," even though that speech assertedly "imposes no demands or burdens on others." Pet. Br. 2, 3. But this contention is wrong in every respect. Far from marking out a "breathtaking" scope, Minnesota's statute addresses speech in only one very limited and specialized location: the polling place. The law is directed at a type of display that threatens to interfere with the right of voters to cast their ballots freely, without intimidation or disruption. And it states a reasonable rule that has been applied by numerous States—without challenge or, for all that appears, any significant limitation on political debate—for over a century.

In fact, Minnesota's Section 211B.11 takes reasonable steps to assure the security and order that is essential if voters are to be able to cast their ballots

efficiently and without interference. For much of this country's history, voting was a dangerous and disorderly process that discouraged large numbers of Americans from entering polling places. Commentators compared elections to sporting events, with heckling and harassing of the other side's voters a natural component of the electoral process and with clothing serving as an indicator of which side a voter favored. Consequently, voters were harassed (or pressured to vote) based on what they wore. In response to these problems, in 1912, Minnesota enacted the predecessor statute to Section 211B.11.

For all the progress the United States has made in the past century, polling-place problems are still widespread. Delays, fights, and other incidents remain common problems. These incidents not only intimidate or discourage the particular voters who are directly affected, but also more generally diminish trust in American election administration and depress voter turnout. Political shirts and buttons, which can impede the voting process and are often designed to provoke and offend, can be expected to exacerbate these problems.

For these reasons, Minnesota has designated polling places nonpublic fora, where voters may cast their ballots freely and without fear of harassment. Restrictions on speech in such a nonpublic forum need only be reasonable. In light of the contentious history of and continuing problems at polling places, Minnesota's decision to exclude political apparel from those locations, and to vest poll workers with discretion to enforce that ban, easily meets this bar. That so many Americans now cast their ballots in a peaceful and orderly process is a testament to how far elections have progressed. The Court should re-

ject petitioners' invitation to return polling places to the turmoil of the past.

## ARGUMENT

### I. STATE REGULATION OF CAMPAIGN RELATED EXPRESSION AT THE POLLING PLACE HAS BEEN KEY TO ESTABLISHING ORDERLY AND PEACEFUL ELECTIONS.

As the Court recognized when it addressed the closely related issue in *Burson* v. *Freeman*, 504 U.S. 191 (1992), the history of legislation like Minnesota's provides helpful context for the question presented here. In attempting to distinguish *Burson*, petitioners mention—but do not describe or discuss—the Nation's electoral history, asserting that the *Burson* Court's decision sustaining Tennessee's establishment of a "campaign-free zone" around polling places concerned only active campaigning or soliciting of votes. Pet. Br. 36-38. But the history of statutes like Tennessee's Section 2-7-111(b) (at issue in *Burson*), Tenn. Code Ann. § 2-7-111(b), and Minnesota's Section 211B.11 (at issue here), Minn. Stat. § 211B.11, shows that the considerations that underlay *Burson* also are present in this case.

Although active solicitation of votes was, indeed, a serious concern at the time these laws were enacted, the regulations were adopted as part of broader election reforms aimed at addressing general disorder and violence around polling places, which was often fueled by campaign paraphernalia. The significant state interest in establishing and maintaining the integrity of the electoral process was properly understood to justify restrictions on the display of such campaign materials, including campaign related badges, buttons, and insignia-bearing clothing.

The American public now associates Election Day with orderly and peaceful (if sometimes long and slow) lines of voters and secret ballots, but this composed electoral process was not the norm for much of American history. Prior to the twentieth century and the widespread adoption of state laws prohibiting electioneering at polling places, Election Day often had an unruly character. The focal point of disorder and raucousness was the polling place. As one scholar has noted, "election contests had marked similarities to sporting events," with voters wagering on the outcome, drinking alcohol, and harassing other voters. Robert J. Dinkin, *Election Day: A Documentary History* 2 (2002). "Banners, placards, fistfights, shouting matches, [and] marching bands" were commonplace. Andreas Teuber, *Elections of Yore*, N.Y. Times,Nov. 4, 1980, at A19, goo.gl/sk4RyQ. The social and party-like atmosphere, as well as the occasional promise of free alcohol, were incentives for citizens to come out and vote. Dinkin, *Election Day: A Documentary History* at 8.

This uncontrolled atmosphere at the polling place often degenerated, with poll workers unable to prevent campaign-related violence and voter intimidation. As the plurality recognized in *Burson*, "[a]pproaching the polling place * * * was akin to entering an open auction place." 504 U.S. at 202. In some elections, party members would actively battle for control of the polling place, marching around the polls and planting banners to declare their dominance. *Young Man Observes Riotous Election in the West—St. Louis, 1838*, in Dinkin, *Election Day: A Documentary History*, at 68-69. Physical violence between opposing parties and ethnic groups became so common in some areas that it was considered the norm, not the exception. Dinkin, *Election Day: A*

*Documentary History*, at 9. One effect of this disorder was to "keep away elderly and timid voters of the opposition." *Burson*, 504 U.S. at 202.

Of particular relevance here, insignia that were worn or displayed by voters contributed significantly to polling place disruptions. Voters were frequently targeted for intimidation based on their clothing and other signals of party allegiance. The gathered crowds "often insulted voters who appeared to be supporting the opposing party," and "individuals were stereotyped as friend or foe on the basis of clothing." Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* 20-21 (2004). By the presidential election of 1896, campaign buttons had also become common identifiers. Ted Hake, *Encyclopedia of Political Buttons: United States 1896-1972*, at 13 (1974). At the polls, voters who explicitly identified with a campaign were approached by others who "construct[ed] them as allies or enemies." Bensel, *The American Ballot Box in the Mid-Nineteenth Century*, at 21.

To address this widespread voter intimidation and disorder, States enacted laws around the turn of the twentieth century prohibiting various forms of electioneering at the polls—including the distribution and display of political insignia. See, *e.g.*, 1912 Minn. Laws, 1st Spec. Sess., Ch. 3, § 13; Ariz. Rev. Stat., Tit. 20, § 77 (1901). Starting in 1893, the Minnesota legislature forbade anyone within 25 feet of the entrance to the polling room to ask, persuade, or endeavor to persuade any person to vote for any particular candidate or to suggest that the voter do so. 1893 Minn. Laws, Ch. 4, § 108. By 1912, a provision was added to prohibit the provision and wearing of political badges, buttons, or other insignia at or

about the polls on the day of an election. See 1912 Minn. Laws, 1st Spec. Sess., Ch. 3, § 13; see also Resp. Br. 4-5.

Concerns that campaign-related speech at the polling place could undermine the integrity of elections were not limited to Minnesota. During this same period, States across the country passed laws to prevent disruption of the electoral process. In 1891, Delaware went so far as to ban "any political discussion" within the polling place. 19 Del. Laws 150 (1891). Wisconsin codified a law in 1889 prohibiting solicitation of votes, electioneering, or the display of ballots at the polls. Wis. Stat. § 23*g* (1889). Similarly seeking to maintain peace and order at the polls, New York prohibited any "political banner, poster, or placard" in the polling place in 1896. 1896 N.Y. Laws 960. And in 1930, New Jersey prohibited badges, buttons, and other insignia at the polls or within 100 feet theoreof. 1930 N.J. Laws 884; see also 1935 Miss. Laws 37 (making it unlawful to post or distribute cards, posters, or other campaign literature within 150 feet of a polling place). Today, ten States have laws materially identical to Minnesota's bar on political apparel in the polling place, and all 50 States have statutes that prohibit some form of electioneering or political display in or around the polls. See Resp. Br. 6; National Ass'n of Secretaries of State, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place* (Aug. 2016), perma.cc/G94A-7UB7. These laws vary from prohibiting loitering and congregating at the polling place to bans on political buttons and attire. *Ibid.*

These state laws securing the vicinity of the polling place effectively reduced the "open auction" na-

ture of elections. In doing so, States promoted peace and prevented intimidation the polls, protecting the integrity of the electoral process. See *State* v. *Black*, 24 A. 489, 490-91 (N.J. 1892). Building on the adoption of the Australian ballot, *Burson*, 504 U.S. at 203-05, these state laws also ensured that votes were not made public, whether by distinctively marked and colored ballots (see *Doe* v. *Reed*, 561 U.S. 186, 226 (2010) (Scalia, J., concurring in the judgment)), or by distinctive clothing and speech. Bensel, *The American Ballot Box in the Mid-Nineteenth Century*, at 20. And by restoring order, these laws—like the Minnesota statute at issue here—made it unnecessary that, in order to exercise the franchise, voters exhibit "firmness" in pressing forward through hostile crowds. George Washington McCrary, *A Treatise on the American Law of Elections* 354 (Henry L. McCune, 2d. ed.,1880). Our modern, more orderly elections reflect the success of these laws in curbing disruption and intimidation, not lack of need for them.

## II. DISRUPTION AT POLLING PLACES REMAINS A SIGNIFICANT PROBLEM.

The success of state election reform laws means that Election Day no longer resembles a professional wrestling match, which greatly increases the likelihood that voters will be able to cast their ballots without fear or harassment. But modern elections are far from problem-free. Voters still sometimes face intimidation, physical violence, and long delays, all of which impede election administration and may frustrate exercise of the right to vote. And each of these dangers is exacerbated by the wearing of political apparel in the polling place—which means that

Minnesota's ban on such apparel is integral to the provision of safe, orderly, and inclusive elections.

### A. Polling places sometimes experience serious disruptions.

There is no doubt that, for all the advances that have been made in the management of elections, the possibility of interference with the operation of the polls remains disturbingly real. In fact, polling places are still sometimes plagued by disruptions such as voter intimidation and fights between individuals. Poll workers face serious challenges in handling these disturbances, which inevitably impede the administration of orderly elections.

Voter intimidation at polling places is well documented. Shouting and other forms of disorder outside voting locations are frequent problems. See, *e.g.*, *What We Know So Far About Voting Problems*, PBS (Nov. 8, 2016), perma.cc/E3A5-M6RN. A small sample of examples from the 2016 election include:

- signs aimed at particular groups, see, *e.g.*, Andrew Kragie (@AndrewKragie), Twitter (Nov. 8, 2016), perma.cc/6EGM-5AUW (documenting a FAGGOTS VOTE DEMOCRAT sign outside a Texas polling place);
- individuals blocking entrances to polling places, see, *e.g.*, Ari Berman (@AriBerman), Twitter (Nov. 8, 2016), perma.cc/BTL3-Z4BG;
- wielding of firearms, see, *e.g.*, Ryan J. Reilly, *A Guy in a Trump Shirt Carried a Gun Outside of a Virginia Polling Place. Authorities Say That's Fine*, Huffington Post (Nov. 4, 2016), perma.cc/RF8V-M5L2; and

- general disorderly conduct, see, *e.g.*, *Live Updates: Voting Issues Reported at Polling Places on Election Day*, CBS News (Nov. 8, 2016), perma.cc/GE5V-LBTP.

Similarly, fights are commonplace at the polls. In 2016, for example, a fight broke out as a result of campaign signs allegedly being too close to a polling place. See CBS Los Angeles, *2 Separate Fights Erupt at Orange County Polling Places* (Nov. 8, 2016), perma.cc/6KF2-6QAM. Polling place fights can involve abusive language and weapons. See, *e.g.*, *Racial Slurs Fly in Polling Place Fight*, TMZ (Nov. 8, 2016), goo.gl/Q3cxMe (describing a fight in which a woman used racial slurs); Sam Smink (@samsmink-WPTV), Twitter (Nov. 8, 2016), perma.cc/7XG9-RBUJ (describing a fight at a polling place in which one man pulled out a gun); Jimmie Johnson, *Fight Breaks Out at Polling Place*, WPBF News (Nov. 8, 2016), perma.cc/7UAE-MELD (documenting a fight in which one voter sprayed another with pepper spray). And most problems of this sort are not communicated to the press, so these reports surely represent only a small fraction of the fights and incidents of voter intimidation that occurred on Election Day in 2016. See, *e.g.*, *Live Updates: Voting Issues Reported at Polling Places on Election Day*, CBS News (Nov. 8, 2016), perma.cc/2YLT-WC35 (noting calls to attorneys general about poll disruptions and other polling place issues).

Unsurprisingly, then, studies of polling places show that disruptive incidents are frequent. The most comprehensive attempt to document such incidents at polling places comes from a study of four recent Wisconsin elections. See Barry C. Burden et al., *What Happens at the Polling Place: Using Adminis-*

*trative Data to Look Inside Elections*, 77 Pub. Admin. Rev. 354 (2017). Although this study did not cover the entire State, and therefore substantially understated the size of the problem, the study reported an average of thirty "disruptions" like fighting and voter intimidation per election. E-mail from Barry Burden, Professor of Political Sci., Univ. of Wis., to Rachel Frank, Yale Law Sch. student (Dec. 27, 2017, 5:38 PM EST) (on file with author). Extrapolated to the national level, this data suggest that there are over 1,500 significant disruptions in every national election. More broadly, the Burden study also found over 15,000 "incidents"—anomalous acts at polling places that required the attention of a poll worker—per election in Wisconsin alone. Burden et al., *What Happens at the Polling Place*, at 357. Roughly extrapolated to the national level, this data indicates that poll workers must contend with more than 750,000 such incidents in each national election.

The effects of these disruptions are exacerbated by the limited ability of poll workers to maintain order at the polls. Jurisdictions report significant trouble finding poll workers (see U.S. Election Assistance Commission, *2014 EAC Election Administration and Voting Survey Comprehensive Report* 14 (June 30, 2015), perma.cc/ADW6-XGDS (reporting that only 8 percent of jurisdictions reported have a "somewhat easy" or "very easy" time recruiting poll workers)), and allocate few resources toward training those they can recruit. See Presidential Comm'n on Election Administration, *The American Voting Experience: Report and Recommendations* 48 (Jan. 2014), perma.cc/GL52-HXXL. These poll workers are often retirees—the average poll worker is 75 years old—and therefore may be limited in their ability to intercede in a violent dispute. See Deborah Barfield Ber-

ry, *Election Officials Try to Recruit Younger Poll Workers*, ABC News, perma.cc/X5JT-F7Y2.

The absence of poll workers who are able to maintain order when disruptions occur has real consequences for voters. Poll-worker shortages are correlated with long lines at the polls, especially in minority-dominated areas. See Christopher Famighetti et al., Brennan Ctr. for Justice, *Election Day Long Lines: Resource Allocation* 2 (Sept. 15, 2014), perma.cc/ZDJ2-QRE2. Election protection reports filed by the Lawyers' Committee for Civil Rights Under Law similarly found that polling place management problems are among the most significant impediments facing voters. See Lawyers' Comm. for Civil Rights Under Law, *Striving to Protect Our Vote in 2016*, at 4 (Dec. 1, 2016), perma.cc/VD4A-5FZF (listing "poor poll worker training" and "voter intimidation and deceptive practices" as "top barriers" to voting in 2016); Lawyers' Comm. for Civil Rights Under Law, *The 2014 Election Protection Report: Democracy Should Not Be This Hard* 27 (Feb. 2015), perma.cc/BEU3-6P7W_(relating that "polling place problems result[ed] in long lines and frustrated voters" in 2014); Lawyers' Comm. for Civil Rights Under Law, *The 2012 Election Protection Report: Our Broken Voting System and How To Repair It* 27 (2013), perma.cc/K6AU-YFMX_(noting that over half of election problems reported to the organization are caused at the polling place); Lawyers' Comm. for Civil Rights Under Law, *Election Protection 2010 Report* 5 (Dec. 31, 2010), perma.cc/YGP7-SFYT (listing "polling place problems" and "deceptive and intimidating practices" as major issues in 2010); Lawyers' Comm. for Civil Rights Under Law, *Election Protection 2008: Helping Voters Today, Modernizing the System for Tomorrow* 12-13 (Dec. 31, 2008), perma.cc/KUM2-

NSX4 (reporting that "deceptive practices" and "polling place problems" were among the most frequent voting issues in 2008). The U.S. Civil Rights Commission has documented the same problems. See U.S. Comm'n on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election* (June 2001), perma.cc/VF3W-TPYD.

The frequency of incidents such as voter intimidation and fights, and the difficulty that poll workers face in managing such disruptions, provides important context as the Court considers petitioners' challenge to a law designed to prevent just such problems.

### B. Disruptions in polling places lead to serious delays and non-voting.

Viewed in isolation, polling place disruptions that may intimidate or discourage individual voters are problematic. But such events also cause systemic problems, as poll workers must cease their routine duties assisting voters to resolve disputes. The resulting delays can cause significant interference with the casting of votes.

Even minor initial delays at the polling place can cascade into skyrocketing waiting times. For example, election experts have modeled the effect of allowing polling place photography such as "ballot selfies," demonstrating that, in the aggregate, small impediments have significant effects. One study found that a ten-second increase in the average time needed to process voters can lead to radically different outcomes in terms of voter waiting time. See Defendant's Expert Report of Charles Stewart, III, Ph.D at 19, *Crookston* v. *Johnson*, No. 1:16–cv–1109, 2016 WL 9281943 (W.D. Mich. Oct. 24, 2016) [hereinafter

Stewart Report]. What may seem like even a small increase in average wait time can have radical effects on the voting process because "queueing systems like those in polling places are very fragile." *Id.* at 20.

And disruptions that cause significant delays are a real impediment to the voting process. Our electoral system is already burdened by pernicious delays. Some voters waited seven hours to vote in 2012 (see Justin Levitt, *"Fixing That": Lines at the Polling Place*, 28 J.L. & Pol. 465, 466 (2013)), 11 hours in 2008 (see Dan Hardy & Nancy Petersen, *Long Lines for Lincoln University Students*, McClatchy Trib. Bus. News (Nov. 5, 2008); *Movie Star Among Voters Running into Problems*, CNN (Nov. 4, 2008), perma.cc/R8YC-LW9Y)), and ten hours in 2004. Levitt, *"Fixing That,"* at 466.

Delays are pervasive. One estimate found that voters spent approximately 23 million hours waiting in line to vote in 2012. Charles Stewart III & Stephen Ansolabeher, *Waiting in Line to Vote* 4 (2013), perma.cc/TE4A-TJ6B. The authors estimate the economic cost from this wasted time at about $550 million. *Id.* at 5. In 2004, eight percent of voters waited at least an hour (see Pew Research Ctr. for People & Press, *November 2008 Re-Interview Survey: Final Topline* 43 (2008), perma.cc/T2MU-4A8L), and 13 percent of jurisdictions nationwide considered long lines to be a major problem at their polling places in November 2000. See U.S. Gov't Accountability Office, *Elections: Perspectives on Activities and Challenges Across the Nation* 194 (Oct. 2001).

These election wait times have a disproportionate impact on minority voters. See Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling*

*Places: How They Can Be Stopped*, 11 Temp. Pol. & Civ. Rts. L. Rev. 401, 430 (2002). They also burden those who must pay for childcare while they vote and those with physical disabilities that prevent them from remaining in long lines. Levitt, *"Fixing That,"* at 467.

As would be expected, these delays have critical consequences for voters. Delays lead voters to "renege," meaning that they "show[] up to vote but leav[e] the line before ever actually casting a ballot," or "balk," meaning that voters "having waited in long lines in a previous election * * * anticipate lines in a future election and simply choose not to participate at all." Defendant's Expert Report of E. Scott Adler, Ph.D, Professor of Political Science, Univ. of Colo. Boulder at 13, *Silberberg* v. *Kosinski*, No. 16-CV-8336, 2017 WL 5641574 (S.D.N.Y. July 27, 2017) [hereinafter Adler Report]. Ten to 15 percent of non-voters "failed to vote because of the lengthy wait times," and "this figure went up between the 2008 and 2012 elections." *Ibid.* Other estimates concluded that between 500,000 and 700,000 persons did not vote in these elections due to long lines. Stewart & Ansolabehere, *Waiting in Line to Vote*, at 3. Long wait times likely contribute to the United States' lagging performance in terms of voter turnout; the U.S. is 28th out of 35 OECD countries in voter turnout. See Adler Report at 12.

Delays also undermine confidence in the electoral system. Political scientists have demonstrated that delays at the polling place play an important role in determining voter perceptions of the quality of their polling-place experience. See Stewart Report at 11 ("One factor that has been shown to influence a voter's perception of the quality of the polling plae

experience is the amount of time spent waiting to vote."). Voters are more than twice as likely to believe that their vote was counted as intended if they think their polling place was run well. See *id.* at 10 (observing that 71 percent of voters reporting their polling place was run "very well" were "very confident their vote was counted as intended," compared to 33 percent reporting that their polling place was "not well" run).

### C. Allowing political apparel in polling places will exacerbate these existing problems.

These realities have obvious implications for the issues in this case: requiring States to permit political apparel at polling places will increase the already common disruptions that poll workers face, cause delays, and ultimately discourage voting.

1. The "Please I.D. Me" buttons at issue in this case provide a clear example of this danger. If the buttons were allowed, voters entering the polling place might mistakenly believe that the people wearing the buttons were poll workers and that voters are required to have an ID to vote in Minnesota. One consequence would likely be that voters without an ID would leave and not cast a vote. See U.S. Gov't Accountability Office, *Elections: Issues Related to State Voter Identification Laws* 48 (Sept. 2014), perma.cc/9849-TMAS (finding that voter ID laws depress turnout by two to three percentage points). Poll workers who notice this problem would be diverted from their other duties to explain that an ID is not needed in Minnesota, wasting time that would otherwise be spent aiding voters. This danger is not fanciful: the *point* of the "Please I.D. Me" button was to generate confusion and intimidation. See Resp. Br. 8.

Alternatively, "Please I.D. Me" buttons or shirts bearing Tea Party-associated images could provoke those with ideological disagreements to confront the wearers. Opposing activists might respond by donning buttons or shirts of their own that say: "Voter I.D. Laws Are Racist." Each side might try to bring larger and larger groups to overwhelm the other. Voters would face an increasingly hostile atmosphere. Fights between the two sides might break out. Poll workers might have to expend precious time and energy ensuring that voters are not harassed. Given the history of polling place disruptions, these are not fantastic scenarios. They simply hark back to an earlier point in history when these sorts of disruptions were the norm.

Nor are these resulting delays likely to be minor. Professor Stewart's analysis in the "ballot selfie" scenario shows that truly brief delays, such as the ten seconds needed to take a photograph, can cascade into much longer delays for subsequent voters. Stewart Report at 19. If a poll worker needs to step in repeatedly, either to clarify voting laws or to intercede between two or more angry voters, such disruptions will not be over in ten seconds; the effects will likely be more drastic still.

2. Moreover, "Please I.D. Me" buttons and Tea Party shirts are just the tip of the iceberg. Political apparel available today is by no means limited to anodyne paraphernalia in the style of "Reagan/Bush '84" or "Stronger Together." Fifteen minutes spent looking at political T-shirts and buttons for sale online reveals the enormous range of harassing, intimidating, and fight-provoking materials available, for purchasers at every spot along the political spectrum. Here and in the Appendix, we provide exam-

ples of the potentially disruptive political apparel that is now readily available—and that, if displayed in the polling place, could well lead to interference with the voting process.

There are T-shirts and buttons that could intimidate disfavored groups. Immigrants are a frequent subject of apparel messaging, such as shirts saying, "GET THE FUCK BACK ACROSS THE BORDER" and "SPEAK FUCKING ENGLISH." Some shirts are more graphic, such as one featuring a picture of two tacos under a box with a stick and the caption "HOW TO CATCH AN ILLEGAL IMMIGRANT." Other minority groups are also frequent subjects of offensive political apparel: "I LEARNED EVERYTHING I NEED TO KNOW ABOUT ISLAM ON 9.11"; "PUT THE WHITE BACK IN THE WHITE HOUSE"; a shirt with a picture of a noose and the phrase "SWING STATE"; "AIDS KILLS FAGS DEAD."

There is apparel that could be seen to threaten violence: "AMMO IS EXPENSIVE: DO NOT EXPECT A WARNING SHOT"; "IF AT FIRST YOU DON'T SUCCEED, RELOAD AND TRY AGAIN"; "SOMETIMES I AIM TO PLEASE, OTHER TIMES I SHOOT TO KILL."

And there is apparel that simply seems designed to provoke supporters of particular candidates or political parties. In 2008, for example, a shirt available for purchase featured a photo of Hillary Clinton and a donkey with the caption "TITS AND ASS 2008." In 2012, a T-shirt declaring "I'D RATHER SHOWER AT PENN STATE THAN VOTE FOR OBAMA" was spotted at a college football game. Such shirts can be found on both sides of the aisle. See, *e.g.*, "HEIL TRUMPLER"; "I WAS GOING TO BE A REPUBLICAN FOR HALLOWEEN BUT MY HEAD WOULDN'T FIT UP MY ASS"; "VOTING FOR TRUMP IS LIKE WINNING THE SPECIAL OLYMPICS. EVEN THOUGH HE WON, YOU'RE STILL RETARDED."

Given our history of electoral disruption—and taking account of human nature and common experience—it is easy enough to anticipate the disruption that such apparel could cause if worn in the polling place. On Election Day, feelings run high. Voters on opposing sides are packed together, often forced to wait impatiently in long lines. State resources to maintain order are limited and stretched thin. In this context, it would be surprising if political apparel that was designed to provoke, intimidate, and confuse voters did not have the desired effect.

## III. A POLLING PLACE IS A NONPUBLIC FORUM WHERE POLL WORKERS MAY EXERCISE DISCRETION TO EXCLUDE APPAREL BEARING POLITICAL MESSAGES.

Minnesota need not ignore these predictably disruptive consequences of political apparel in the polling place. The State's response to this threat has been targeted and narrow: it is directed only at manifestly political apparel designed to influence or affect an election or voting, not at all offensive clothing and insignia. As we have shown, the wearing of such apparel may introduce disorder into a process where disruption would interfere with others' right to vote, making it reasonable for Minnesota to restrict political apparel at polling places. And because the regulation is reasonable, it is constitutional. Section 211B.11 is a regulation of a nonpublic forum, and is thus subject to review only for reasonableness.

Petitioners entirely sidestep forum analysis for this reason. See Pet. Br. 30 (calling such analysis "irrelevant"). But application of forum doctrine to Section 211B.11 necessarily leads to the conclusion that polling places serve a government function that would be undermined by expressive activity, and

that the State should be afforded space to serve this purpose by limiting the display of political apparel so long as it does not do so in a way that discriminates between viewpoints. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.").

**A. Forum analysis must be applied to Section 211B.11.**

When "assessing restrictions that the government seeks to place on the use of its property[,]" a "forum-based" approach is necessary. *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). This analysis is a "means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion) (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

The nature of the forum, and the level of scrutiny given to regulation of a government-controlled space, is determined by the forum's intended and historical use. If the property has "traditionally been available for public expression" or if the State has opened it up to "expressive activity by part or all of the public[,]" it is "subject to the highest scrutiny" and any regulation of speech in the forum must be "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness*, 505 U.S. at 678; see also *Perry*, 460 U.S. at 45 (defining a public forum as one that "by long tradition or by government fiat ha[s] been devoted to assembly and debate"). But

regulations of "all remaining public property" are subject only to a "much more limited review": "The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *International Soc'y for Krishna Consciousness*, 505 U.S. at 678-79.

Where the "principal function of the property would be disrupted by expressive activity," the Court has been especially "reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804. Accordingly, the Court has deferred to the State on how expressive activity should be regulated when expression has the potential to interfere with government purposes. See, *e.g.*, *Kokinda*, 497 U.S. at 723 (upholding a regulation prohibiting the solicitation of "alms and contributions" at post offices); *Lehman* v. *Shaker Heights*, 418 U.S. 298, 299 (1974) (upholding a law banning political advertising on public buses).

**B. A polling place is a nonpublic forum, where restrictions on expression need only be reasonable.**

In this context, a polling place is a quintessential nonpublic forum, where viewpoint-neutral restrictions on expression are permissible so long as they are reasonable. Polling places serve a critical state interest, and they have not historically served as sites of debate or assembly.

A polling place is not a public forum by "government fiat," designated as a site for discourse or self-expression. *Perry*, 460 U.S. at 45. Instead, it is set up for a clear and specific governmental purpose. Polling places are organized for the management of elec-

tions, where people go to obtain their ballots, fill the ballots out in a private booth, and then return the ballots for counting. To serve that end, the State is concerned with managing the polling place in a way that avoids interference with the vote and promotes peace and efficiency. See *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015) (describing a nonpublic forum as a place where governments acts as "a proprietor, managing its internal operations" (quoting *International Soc'y for Krishna Consciousness*, 505 U.S. at 679)). The State may regulate expression in this space in a way that limits disturbances, as "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800.

Further, a polling place is a nonpublic forum by "by long tradition." *Perry*, 460 U.S. at 45. Polling places have not historically "been devoted to assembly and debate." *Ibid.* To the contrary, there has been a "widespread and time-tested consensus demonstrat[ing] that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206 (plurality opinion).

In *Burson*, the plurality found that a law restricting campaigning on the public sidewalk near a polling place is subject to strict scrutiny—upholding the law under that standard—on the view that sidewalks and streets generally fall into the public forum category, without addressing the status of the polling place itself. 504 U.S. at 196 n.2. But emphasizing the

special role of the polling place, Justice Scalia's deciding concurrence observed that the "streets and sidewalks around polling places have traditionally not been devoted to assembly and debate" and "are not public forums *in all places*, and the long usage of our people demonstrates that the portions of streets and sidewalks adjacent to polling places are not public forums *at all times* either." *Id.* at 216 (Scalia, J., concurring) (citing *Greer* v. *Spock*, 424 U.S. 828 (1976) (holding that the streets and sidewalks on military bases do not qualify as public fora)).

Whatever the validity of that conclusion as to public streets and sidewalks, it surely is correct as to polling places themselves:

> The forum here, the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter's communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space.

*Marlin* v. *D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 718 (D.C. Cir. 2001) (citing *Burson*, 504 U.S. at 201-06). And as a polling place is a nonpublic forum set up to facilitate elections rather than promote expression, regulations of this space need only be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 49.

### C. It is reasonable for Section 211B.11 to make subject matter distinctions and grant discretion to poll workers.

Here, the interest in preventing voter intimidation and disruptions like fights—as well as the delays and the associated suppression of voting that these disruptions may engender—is more than logically served by Section 211B.11. If, as the *Burson* plurality decided, campaign materials may be limited in and around polling places under an exacting scrutiny analysis, surely a regulation doing the same for political materials in the polling place must be treated as reasonable. Although petitioners challenge Minnesota's law on the ground that it makes distinctions on the basis of content and affords government officials too much discretion in applying those distinctions, these features serve the law's purpose and are reasonable regulations of a nonpublic forum.

Petitioners make much of the law's explicit regulation of "political" speech. See Pet. Br. 20-21. But given that the defining feature of a polling place is to manage the input of political preferences through voting, it is logical that expression on these preferences be limited at the polling place to provide a neutral space for voters to effectuate their right without disruption or intimidation. When a space is under government control, as it is here, the government may put limits on even "protected speech" if that speech is contrary to the government's legitimate purpose. *Cornelius*, 473 U.S. at 799. Subject matter distinctions, like ones concerning political speech, are "[i]mplicit in the concept" of such a forum. *Perry*, 460 U.S. at 49. In these spaces, the constitutional requirements are simply that the regulation on speech

is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

The grant of discretion to poll workers in Section 211B.11 is also a logical feature of a law enacted to limit immediate disruptions to polling places, as the Minnesota legislature cannot anticipate and itemize all the types of disruptive political messages that could be displayed. Like any other reasonable regulation involving a nonpublic forum or the analogous doctrine of government speech, "substantial discretion" is tolerable if it serves a government purpose and does not result in viewpoint discrimination. *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 572-73 (1998); see also *Griffin* v. *Secretary of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) ("[T]he fact that discretionary access is a defining characteristic of the nonpublic forum should suggest that more official discretion is permissible in a nonpublic forum than would be acceptable in a public forum.").

Nonetheless, petitioners argue that Section 211B.11 runs afoul of the First Amendment because of this discretionary grant. Pet. Br. 23-24. But in making this argument, they fail to invoke any decision involving nonpublic fora. Although unbridled discretion may create First Amendment difficulties where a government official is, for example, deciding who may receive a parade permits on a public road, discretion that is exercised in a viewpoint-neutral manner does not pose such problems when it is needed to carry out the government's purpose in a nonpublic forum. Cf. *Forsyth Cty.* v. *Nationalist Movement*, 505 U.S. 123 (1992) (striking down variable fees for use of a public forum); *City of Lakewood*

v. *Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) (striking down a law licensing newsracks in a public forum). Indeed, "[a]ll of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum." *Griffin*, 288 F.3d at 1321.

Here, the ban on "political" insignia does not grant election workers the discretion to discriminate between viewpoints. It is, instead, a reasonable attempt to identify messages with political meanings that could affect the integrity of an election. Such an implementation mechanism is not only reasonable but necessary, given the unique logistical challenges of election administration.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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February 2018

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[2] Representation by a clinic affiliated with the Yale Law School does not reflect the institutional views of the Yale Law School or Yale University.

## APPENDIX

### Apparel Directed at Candidates and Political Parties

- "ANNOY A REPUBLICAN. USE FACTS AND LOGIC," CafePress, perma.cc/LGG7-NT4X.
- "BROS BEFORE HOES" (PICTURE OF PRESIDENT OBAMA AND SECRETARY CLINTON), *Political T-Shirts at T-Shirt Hell*, Tee Reviewer (Mar. 13, 2008), perma.cc/DXR7-DPGC.
- "DUMP TRUMP IMPEACH CHEETO FACE: MAKE AMERICA RIOT AGAIN" (IMAGE OF A HAND PUNCHING PRESIDENT TRUMP, WHO IS WEARING A SWASTIKA BUTTON), Etsy, perma.cc/L9LZ-VJSU.
- "ELECTION 2008: 99 PROBLEMS AND THE BITCH IS ONE" (PICTURE OF HILLARY CLINTON), *Political T-Shirts at T-Shirt Hell*, Tee Reviewer (Mar. 13, 2008), perma.cc/DXR7-DPGC.
- "FUCK TRUMP," eCrater, perma.cc/A249-8XQW.
- "GROPER IN CHIEF," Etsy, perma.cc/2U4A-JF9D.
- "HEIL TRUMPLER," *'Heil Trumpler': Protester Throws Tomatoes at Trump During Iowa Rally*, Ruptly, perma.cc/797Q-TMB
- "HILLARY FOR PRISON 2016," eBay, perma.cc/4N-PJ-VCYR.
- "HITLER GAVE GREAT SPEECHES TOO" (WITH CARTOON OF HITLER AND PRESIDENT OBAMA), Foul Mouth Shirts, perma.cc/LF7V-TGC3.
- "I'D RATHER SHOWER AT PENN STATE THAN VOTE FOR OBAMA," Justin Baragona, *LSU Football Fans Display Anti-Obama Signs on ESPN's College*

*GameDay*, Politicus Sports (Oct. 25, 2014), goo.gl/64QaKf.

- "I WAS GOING TO BE A REPUBLICAN FOR HALLOWEEN BUT MY HEAD WOULDN'T FIT UP MY ASS," CafePress, perma.cc/68T5-BBD7.
- "KFC HILLARY SPECIAL: 2 FAT THIGHS, 2 SMALL BREASTS . . . LEFT WING," Jenna Johnson (@wpjenna), Twitter (May 2, 2016, 6:40 PM), perma.cc/4ZKE-83C8.
- "LIFE'S A BITCH: DON'T VOTE FOR ONE" (PICTURE OF SECRETARY CLINTON), Teespring, perma.cc/5LV7-4FUB.
- "MAP OF DUMBFUCKISTAN" (MAP OF UNITED STATES WITH MAP LEGEND LABELING RED STATES AS "DUMBFUCKISTAN"), CafePress, perma.cc/PCM9-7T4R.
- "NAZI TRUMPS: FUCK OFF!," Alternative Tentacles, perma.cc/HLM4-TFR4.
- "OBAMA '12" (PICTURE OF A MONKEY), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "OBAMA IN '08" (PICTURE OF MONKEY), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "OBAMA IS MY SLAVE," Earnest Harris, *Obama Ugly Slave Tee: "But It's Not About Race,"* Huffington Post (Dec. 6, 2017), perma.cc/Z7HY-W8BN.
- "PUTIN'S BITCH," (WITH PHOTO OF PRESIDENT TRUMP), Redbubble, goo.gl/3munuy.

- "SUPER CALLOUS FRAGILE RACIST SEXIST NAZI POTUS," Redbubble, perma.cc/JF5F-X9FM.
- "TINKLE TINKLE LITTLE CZAR.. PUTIN PUT YOU WHERE YOU ARE..," *Tinkle Tinkle Trump*, Teespring, perma.cc/9TM9-3SY7.
- "TITS AND ASS '08" (PICTURE OF SECRETARY CLINTON AND A DONKEY), *Political T-Shirts at T-Shirt Hell*, Tee Reviewer (Mar. 13, 2008), perma.cc/DX-R7-DPGC.
- "TRUMP: MAKE AMERICA GROPE AGAIN," Zazzle, goo.gl/pnX4Zt.
- "VOTING FOR TRUMP IS LIKE WINNING THE SPECIAL OLYMPICS. EVEN THOUGH HE WON, YOU'RE STILL RETARDED," Foul Mouth Shirts, perma.cc/9BWG-8QEK.
- "WE NEED A LEADER NOT A CREEPY TWEETER," Etsy, perma.cc/REJ2-DNLD.
- "WE HATE TRUMP BECAUSE HE IS RACIST; YOU HATED OBAMA BECAUSE YOU ARE RACIST," Teespress, Pinterest, perma.cc/H4AN-4LS7.

**Apparel Directed at Minority Groups**

- "AIDS KILLS FAGS DEAD," *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/6YJG-TNNS.
- "ALIEN INVASION: THERE'S NO PLACE LEFT TO RUN..." (PICTURE OF SOMBREROS MEANT TO LOOK LIKE FLYING SAUCERS), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.

- "BE HAPPY, NOT GAY," *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/MH7M-QB3R.
- "BLACK OLIVES MATTER," Alexandra Ilyashov, *The Man Behind This Cringe-Worthy Black Lives Matter "Joke" Refuses To Apologize*, Refinery29 (Aug. 16, 2016, 6:00 PM), perma.cc/7FFQ-BJAK.
- "GET THE FUCK BACK ACROSS THE BORDER," Foul Mouth Shirts, perma.cc/R7S6-C3UE.
- "GO HOME DEPORT ILLEGALS," Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "HOW TO CATCH AN ILLEGAL IMMIGRANT" (FEATURING A PICTURE OF TWO TACOS UNDER A BOX WITH A STICK), *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/BN25-RMGU.
- "I LEARNED EVERYTHING I NEED TO KNOW ABOUT ISLAM ON 9.11," Politically Erect Shirts, goo.gl/b1Aysn.
- "PUT THE WHITE BACK IN THE WHITE HOUSE," Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "SPEAK FUCKING ENGLISH," Foul Mouth Shirts, perma.cc/GY6S-6T5M.
- "TRAYVON" (PICTURE OF A MIDDLE FINGER), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.

**Apparel Advocating Violence**

- "AMMO IS EXPENSIVE: DO NOT EXPECT A WARNING SHOT," Road Kill T-Shirts, perma.cc/XMB3-U92Q.
- "ENJOY THE SILENCE" (FEATURING A PICTURE OF A WOMAN WITH TAPE OVER HER MOUTH), *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/2CK5-UF3R.
- "FUCK YOUR GOD," No Gods No Masters, perma.cc/N9T7-KAD3.
- "KEEP CALM AND RAPE ON," *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/R397-4VBA.
- "IF AT FIRST YOU DON'T SUCCEED, RELOAD AND TRY AGAIN," Bad Idea T-Shirts, perma.cc/47RJ-VG9K.
- "SOMETIMES I AIM TO PLEASE, OTHER TIMES I SHOOT TO KILL," Foul Mouth Shirts, perma.cc/-UL6U-AE83.
- "SWING STATE" (PICTURE OF A NOOSE), Photobucket, perma.cc/YWB6-YR2G.